(9)

No. 94-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

REYNOLDSVILLE CASKET CO., *et al.*,

Petitioners,

v.

CAROL L. HYDE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF FOR RESPONDENT

DAVID J. BARDLEY
(Counsel of Record)
BARDLEY & ZIELANDT
114 East Park Street
Chardon, Ohio 44024
(216) 286-4177

TIMOTHY R. DYK
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Respondent

QUESTION PRESENTED

Whether federal law requires the dismissal of state court cases that appeared timely when filed, but proved untimely under the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

TABLE OF CONTENTS

Page

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

RULES

MISCELLANEOUS

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

REYNOLDSVILLE CASKET CO., *et al.*,

Petitioners,

v.

CAROL L. HYDE,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On March 5, 1984, while driving a truck owned by petitioner Reynoldsville Casket Company, petitioner John Blosh struck another car in which respondent Carol Hyde was a passenger. Pet. App. A19. The accident occurred in Ashtabula County, Ohio. *Id.* Respondent suffered substantial injuries as a result. *Id.*

Ohio imposes a two-year statute of limitations for personal injury claims. Ohio Rev. Code § 2305.10. At the time of the accident, however, a tolling statute prevented the limitations period from running against any prospective defendant (whether an Ohio resident or otherwise) while that defendant remained "out

of state" or "concealed." *Id.* § 2305.15.[1] Under then-binding Ohio precedents, Section 2305.15 clearly applied both to Reynoldsville Casket, a Pennsylvania corporation with neither an office nor an appointed agent in Ohio (Pet. App. A30), and to Blosh, who is also a Pennsylvania resident (Pet. App. A31). *See, e.g., Seeley v. Expert, Inc.*, 269 N.E.2d 121 (Ohio 1971); *May v. Leidli*, 513 N.E.2d 1347, 1349 (Ohio Ct. App. 1986) ("If a defendant is not amenable to personal service within the state of Ohio, he is presumed to be 'out of state' within the meaning of R.C. 2305.15.").[2] No case had suggested that the statute was unconstitutional. Indeed, just two years earlier, this Court in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), while reserving a Commerce Clause issue, had upheld a substantially more onerous New Jersey tolling statute against Equal Protection challenge.

On August 11, 1987, respondent filed a personal injury action against petitioners in the Court of Common Pleas of Ashtabula County. J.A. 6. Respondent alleged a claim against Blosh for negligence and a claim against Reynoldsville Casket, as Blosh's employer, under a theory of respondeat superior. J.A. 7-8. Petitioners moved to dismiss the complaint as untimely (J.A. 1) on the ground that Section 2305.15 was unconstitutional.

---

[1] When respondent filed this lawsuit, Section 2305.15 provided that:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14 . . . does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Pet. App. A3-A4. A successor provision is identical in all material respects. *See* Pet. Br. 3-4 (quoting both provisions).

[2] As the Ohio Supreme Court explained, *May* set forth the "most recent interpretation" of Section 2305.15 binding on the trial court in which respondent filed suit. Pet. App. A8.

On June 17, 1988, almost one year after respondent had filed her complaint, and while petitioners' motion to dismiss was still pending, this Court held in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), that Section 2305.15 violated the Commerce Clause.[3] The Court evaluated Section 2305.15 under the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which requires a determination whether "the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). The Court reasoned that Section 2305.15 imposed a "significant" burden on interstate commerce by requiring out-of-state defendants, as a condition of obtaining protection of the Ohio statutes of limitations, to "appoint a resident agent for service of process" and thereby "subject [themselves] to the general jurisdiction of the Ohio courts." 486 U.S. at 892. Moreover, despite acknowledging the "important" consideration that serving out-of-state defendants "may be more arduous" than serving in-state defendants (*id.* at 893), and even though *Searle* recently had held that states may eliminate this disparity through tolling statutes without violating the Equal Protection Clause, the Court now stressed that "state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny." *Id.* at 894. The Court concluded that because the "significant" interstate burdens exceeded the "important" local benefits, Section 2305.15 must be invalid. *See id.* at 891-95.

Following *Bendix*, the Court of Common Pleas dismissed respondent's complaint in its entirety (Pet. App. A27), and the Court of Appeals of Ashtabula County affirmed (Pet. App. A18). That court held that *May v. Leidli*, its own recent precedent on point, was "no longer binding" after *Bendix*. Pet. App. A23. The court further held that even though *Bendix* had established a

---

[3] This Court affirmed a Sixth Circuit decision announced approximately two months before respondent filed her complaint. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 820 F.2d 186 (6th Cir. 1987).

"clear break in the law," retroactive application of *Bendix* was nonetheless required. Pet. App. A25-A26.

The Ohio Supreme Court reversed the dismissal and remanded for a trial on the merits. Pet. App. A1. First, the Court held that under the three remedial considerations set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), federal law did not require the dismissal under *Bendix* of complaints filed before that case was decided. The court explained that *Bendix* established a "new principle of law" in Ohio, within the meaning of *Chevron Oil* (*id.* at 107), because *Bendix* marked "the first time that any court of binding authority in Ohio's state courts had ruled [Section] 2303.15 unconstitutional." Pet. App. A6. Moreover, stressing the "factual similarities" between this case and *Chevron Oil*, the court held that refusals to dismiss pre-*Bendix* complaints would not "retard the operation" of *Bendix*, and that dismissals would inflict "injustice or hardship" on plaintiffs like respondent. Pet. App. A5-A6.

Next, the Ohio Supreme Court explained that *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), which confirmed that the decisions of this Court apply retroactively, preserved some latitude for state courts to "tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied." Pet. App. A7. In particular, the court suggested, *Harper* does not require state courts to afford retroactive remedies for constitutional violations established by the retroactive application of a new rule of law.[4]

---

[4] In the alternative, the court held that because *Harper*'s retroactivity holding rested on non-constitutional grounds, and because a dismissal remedy would violate a state constitutional provision guaranteeing open courts (Ohio Const. Art. I, § 16), dismissal would be inappropriate even if it were commanded by *Harper* as a matter of federal law. Pet. App. A9. We agree with petitioners that this alternative holding misapprehends the clear command of the Supremacy Clause (U.S. Const. Art. VI, cl. 2), under which applicable federal law (even if non-constitutional) displaces all conflicting state law (even if constitutional).

Two judges dissented, stressing that *Harper* requires the retroactive application of this Court's decisions as a matter of federal law. Pet. App. A10. On the separate question whether *Harper* also requires retroactive remedies, the dissenters made two points. First, even though they urged affirmance of the dismissal of respondent's complaint, they argued that consideration of any remedial issue was somehow premature because there had been no "finding of liability" made against petitioners. Pet. App. A11. Second, they argued that even though federal law sometimes permits the denial of retroactive remedies, "[n]o one has suggested, however, that states may use the remedy issue as a way to avoid application of the retroactivity rule from *Harper*, which is precisely what the majority accomplishes with its ruling." Pet. App. A12.

SUMMARY OF ARGUMENT

Whenever a judicial decision announces a new rule of law, two distinct questions involving retroactivity are presented: first, whether the decision applies retroactively as a choice-of-law matter; and second, if it does, whether the novelty of the decision should affect the remedies available for pre-decision conduct or violations.

Harper v. Virginia Department of Taxation, 113 S. Ct. 2510 (1993), held that the decisions of this Court apply retroactively, but did not address any separate question about remedies. In *Harper*, the Court adopted in the civil context Justice Harlan's position that prospective application is incompatible with the judicial role. Justice Harlan also argued, however, that courts may permissibly deny remedies against parties who, at the time of their actions, reasonably relied on existing law. *See United States v. Estate of Donnelly*, 397 U.S. 286, 295-96 (1970) (concurring opinion). In the important civil retroactivity opinions between *Estate of Donnelly* and *Harper*, Justices embracing the

---

The court's error on this point, however, leaves undisturbed its holding that *Harper* does not require the dismissal of pre-*Bendix* complaints.

Harlan position against prospectivity also consistently embraced the Harlan position in favor of remedial limitations. *See American Trucking Ass'ns v. Smith*, 496 U.S. 167, 205 (1990) (Stevens, J., dissenting); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (opinion of Souter, J.). By its terms, *Harper* did nothing more than adopt for the Court the position against retroactivity expressed in those opinions, leaving undisturbed its longstanding view that remedial limitations are permissible.

The sole question here is whether remedial limitations consistent with the standards applied in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), violate the Due Process Clause or any other provision of the federal Constitution. The Constitution permits some constitutional violations, including the one at issue here, to go unremedied. This case involves a defendant's rights under a statute of limitations. Because statutes of limitations are merely "expedients," the Due Process Clause permits legislatures to retroactively revive expired limitations periods. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311-14 (1945). Moreover, courts retain broad equitable power to toll statutes of limitations in a wide variety of circumstances. *See, e.g., American Trucking*, 496 U.S. at 221 (Stevens, J., dissenting); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Consistent with longstanding equitable principles, this Court repeatedly has held, in *Chevron Oil* and its progeny, that the federal courts should toll the limitations period and decline to dismiss claims that appear timely when filed, but are rendered untimely by the retroactive application of a subsequent judicial decision. The *Chevron Oil* principles clearly apply to cases where, as here, the subsequent judicial decision involves a constitutional question. Moreover, if the federal courts may impose remedial limitations when the *Chevron Oil* principles are satisfied, then the state courts may do the same.

The remedial limitation approved in *Chevron Oil* is also consistent with a wide range of analogous doctrines. In the qualified immunity and federal habeas contexts, this Court has adopted even broader limitations on the availability of remedies

for constitutional violations established by the retroactive application of new law. Moreover, by permitting delay in the implementation of its injunctive decrees, this Court has adopted analogous remedial limitations even where prospective relief is at issue. Finally, invoking principles like those used in *Chevron Oil*, this Court has adopted limitations on the availability of retroactive relief for a wide variety of constitutional, statutory and procedural violations not involving statute of limitations issues.

A practice this common is unlikely to violate the Due Process Clause, and petitioners cite no authority suggesting that it does. *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), does not advance their position. *McKesson* held that the Due Process Clause requires retroactive relief in favor of taxpayers forced to pay an unconstitutional tax without any opportunity to challenge the tax in advance. *McKesson*, however, did not involve the retroactive application of new law. And in any event, *McKesson* turned on the very different remedial considerations that apply in the tax refund context.

The Ohio Supreme Court correctly held that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), satisfied the *Chevron Oil* criteria. First, by invalidating an Ohio tolling statute applied for almost two centuries without hint of constitutional difficulty, *Bendix* clearly established a new principle of law. Second, the purposes of the *Bendix* rule — to prevent the states from discriminating against or unreasonably burdening interstate commerce — do not require retroactive remedies, because the Ohio Supreme Court's neutral application of *Chevron Oil* will affect only a closed class of past cases. Third, dismissing respondent's complaint, notwithstanding her obvious reliance on a presumptively valid tolling statute, would produce an inequitable result.

Finally, petitioners do not, and could not, argue that the Ohio Supreme Court invoked the remedial limitation approved in *Chevron Oil* as a pretext for discrimination on any basis that the Constitution prohibits.

ARGUMENT

Whenever a judicial decision announces a new rule of law, two distinct questions involving retroactivity are presented. The issue of retroactivity as such — "whether the court should apply the old rule or the new one" to events that occurred prior to the decision — is "a matter of choice of law." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-35 (1991) (opinion of Souter, J.). That choice-of-law determination is a pure question of federal law. *See, e.g., Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2518-19 (1993).

In *Harper*, this Court held that its own decisions must apply retroactively, even if they announce new rules of law. The Court explicitly rejected the technique of "selective" prospectivity, under which a new rule would apply to the decision in which it was announced, but to no other cases involving pre-decision events. *See id.* at 2517-18. Moreover, the Court's broad language cast grave doubt on the permissibility of "pure" prospectivity, under which a new rule would not apply even to the decision in which it was announced. *See, e.g., id.* at 2516 ("'[T]he nature of judicial review' strips us of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." (citation omitted)). As a result of *Harper*, there is no question that *Bendix* retroactively invalidated Section 2305.15.

Once a new rule is applied retroactively, however, "there may then be a *further* issue of remedies, *i.e.*, whether the party prevailing under the new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Beam*, 501 U.S. at 535 (opinion of Souter, J.) (emphasis added).[5] Because federal law merely "sets certain minimum requirements

---

[5] *See also American Trucking Ass'ns v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion) ("It is important to distinguish the question of retroactivity at issue in this case from the distinct remedial question"); *id.* at 210 (Stevens, J., dissenting) ("This case . . . requires us for the first time to expressly distinguish between retroactivity as a choice-of-law rule and retroactivity as a remedial principle.").

that the States must meet but may exceed in providing appropriate relief," *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 178-79 (1990) (plurality opinion), the remedial issue, at least in cases arising in state court, involves a "mixed question of state and federal law." *Id.* at 205 (Stevens, J., dissenting). *See also Harper*, 113 S. Ct. at 2519-20. Thus, notwithstanding the existence of a constitutional violation in this case, a distinct remedial question remains: whether federal law requires the Ohio courts to grant petitioners a retroactive remedy — dismissal of respondent's pre-*Bendix* complaint — notwithstanding respondent's reasonable reliance on existing law when she filed her complaint.

In *Chevron Oil v. Huson*, 404 U.S. 97 (1971), this Court addressed a similar question. There, as here, a plaintiff filed a complaint that appeared timely when filed, but that proved untimely under a subsequent decision of this Court. After noting that "[t]he most [the plaintiff] could do was to rely on the law as it then was" (*id.* at 107), and after conducting a "weighing of the equities" that took such reliance into account (*id.* at 109), this Court held that federal law did not require a retroactive dismissal remedy. *Id.* To that extent, *Chevron Oil* was consistent with well-settled equitable and remedial principles. *See, e.g., City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 718-21 (1978); *Lemon v. Kurtzman*, 411 U.S. 192, 199-206 (1973) (*Lemon II*). While Justice O'Connor and Justice Stevens debated in *American Trucking* whether *Chevron Oil* also set forth a choice-of-law holding, there is now general agreement that *Chevron Oil* contained at least an alternative remedial holding. *See, e.g., Harper*, 113 S. Ct. at 2537 (O'Connor, J., dissenting); *American Trucking*, 496 U.S. at 218-25 (Stevens, J., dissenting).

Harper, of course, overruled *Chevron Oil* to the extent that *Chevron Oil* rested on a choice-of-law rationale. The question presented here is whether *Harper* or the Constitution also require

this Court to overrule *Chevron Oil's* remedial holding. They clearly do not.[6]

I. *HARPER* DOES NOT ADDRESS ANY QUESTION ABOUT REMEDIES

Throughout their brief, petitioners correctly insist that *Harper* compels the retroactive application of *Bendix*.[7] However, petitioners themselves acknowledge that the retroactivity question and the remedial question are distinct. Pet. Br. 22-23 ("Once a rule is found to apply backwards, there may be a further issue of remedies"). And, petitioners further acknowledge that the Ohio Supreme Court's consideration of respondent's reliance interests, within the framework of *Chevron Oil*, "was obviously in the context of a remedy analysis." Pet. Br. 11. *Harper* has nothing to do with the distinct remedial question presented here.

The Court's current retroactivity doctrine, established in the criminal context in *United States v. Johnson*, 457 U.S. 537 (1982), and *Griffith v. Kentucky*, 479 U.S. 314 (1987), and in the civil context in *Beam* and *Harper*, explicitly reflects the views expressed by Justice Harlan in his seminal separate writings in *Desist v. United States*, 394 U.S. 244 (1969), and *Mackey v.*

---

[6] Like the dissenting judges below, petitioners also contend that consideration of any remedial issue is unripe because petitioners have not yet been found liable to respondent. Pet. Br. 24. This argument is insubstantial. The remedial question before the Court is not whether respondent is entitled to recover damages from petitioners, but whether petitioners are entitled, given that *Bendix* has retroactively invalidated Section 2305.15, to have respondent's pre-*Bendix* complaint dismissed as untimely. There is nothing premature about that question.

[7] In *Bendix* itself, this Court affirmed the dismissal of a complaint on statute of limitations grounds, but declined to address whether the *Chevron Oil* criteria had been satisfied because that question was not preserved in the courts below. *See* 486 U.S. at 895.

United States, 401 U.S. 667 (1971).[8] In *Desist* and *Mackey*, Justice Harlan levelled three related criticisms against the Court's then-current practice of "selective" prospectivity in criminal cases: first, it unfairly treated similarly situated defendants differently; second, it undermined the integrity of judicial review; and third, it enmeshed the courts in fundamentally legislative controversies. *See* 394 U.S. at 258-59 (dissenting opinion); 401 U.S. at 677-81 (opinion concurring in the judgment).

In 1970, however, Justice Harlan wrote an equally important opinion making clear that his views on retroactivity were entirely consistent with the many precedents of this Court embracing remedial discretion — including remedial discretion to account for reliance on old law subsequently modified. In *United States v. Estate of Donnelly*, 397 U.S. 286 (1970), Justice Harlan extended his attack on prospectivity to the civil context:

> The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court.

Id. at 295-96 (concurring opinion). At the same time, however, Justice Harlan confirmed that reliance interests are entirely appropriate remedial considerations:

> To the extent that equitable considerations, for example, "reliance," are relevant, I would take this into account in the

---

[8] The Court also has explicitly adopted Justice Harlan's position in *Desist* and *Mackey* that the special nature of federal habeas corpus justifies the denial of retroactive relief under new rules of criminal procedure announced after a conviction has become final on direct review. *See, e.g., Butler v. McKellar*, 494 U.S. 407 (1990); *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion).

> determination of what relief is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of damages to a party who finds himself able to avoid a once-valid contract under new notions of public policy. . . . The essential point is that while there is flexibility in the law of remedies, this does not affect the underlying substantive principle that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them.

Id. at 296-97.

In this Court's subsequent opinions in the civil context leading to *Harper*, Justices embracing the Harlan position plainly approved both the retroactivity *and* the remedial elements of Justice Harlan's analysis in *Estate of Donnelly*. Thus, speaking for four Justices in *American Trucking*, Justice Stevens argued that while "adherence to legal principle requires that we determine the rights of litigants in accordance with our best current understanding of the law," that "current understanding" may "include a law of damages that recognizes reliance interests." 496 U.S. at 214 (dissenting opinion). *See also* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1798 (1991) ("[A] court must apply the relevant law, but the relevant law includes the law of remedies, under which it may be appropriate to deny relief even where a violation has been found.").

Announcing the lead and controlling opinion in *Beam*, Justice Souter also argued that while litigants cannot be "distinguished for choice-of-law purposes on the particular equities of their claims" (501 U.S. at 543), "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases" (*id.* at 543-44). Justice Souter stressed the point repeatedly: "Nothing we say here deprives respondent of his opportunity to . . . demonstrate reliance interests entitled to

consideration in determining the nature of the remedy that must be provided." *Id.* at 544 (citing *Estate of Donnelly*, 397 U.S. at 296 (Harlan, J., concurring)).

Against this background, nothing in *Harper* even remotely suggests that the Court intended to restrict the availability of remedial discretion, whether to account for reliance interests or otherwise. The only issue before the Court was a choice-of-law question, since the court below had held that tax assessments inconsistent with *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), but rendered prior to that decision, "'were neither erroneous nor improper.'" *Harper*, 113 S. Ct. at 2514 (quoting opinion below). In rejecting that position, the Court merely adopted a *retroactivity* rule that "fairly reflects the position of a majority of Justices in *Beam*." *Id.* at 2517. The Court further confirmed Justice Souter's position that "'the *Chevron Oil* test cannot determine *the choice of law* by relying on the equities of a particular case.'" *Id.* at 2516 n.9 (quoting *Beam*, 501 U.S. at 543 (emphasis added)). After rejecting the lower court's non-retroactive application of *Davis*, the Court remanded the case, without addressing the question whether reliance interests could support the exercise of remedial discretion, for the lower courts to perform "tasks pertaining to the crafting of any appropriate remedy." *Id.* at 2520. In sum, the five-Justice majority in *Harper*, which included Justices Stevens and Souter, gave absolutely no indication that it was abandoning the principles of remedial discretion embraced by Justice Harlan in *Estate of Donnelly*, by Justice Stevens in *American Trucking*, and by Justice Souter in *Beam*.

Although urging in *Harper* that *Chevron Oil* should support the prospective application of *Davis*, Justice O'Connor also addressed the remedial issues not reached by the Court. She too argued that "it should be constitutionally permissible for the equities to inform the remedial inquiry." *Id.* (dissenting opinion). She also explained — without provoking any disagreement from the majority — that the Court's retroactivity holding did not address "the separate question of the *remedy* that must be given." *Id.* at 2536 (emphasis in original). Finally, she explained that "[i]f

Justice Stevens' view or something like it has prevailed today — and it seems that it has — then state and federal courts still retain the ability to exercise their 'equitable discretion' in formulating appropriate relief on a federal claim." *Id.* Justice Kennedy likewise explained that nothing in *Harper* is "inconsistent" with the proposition that "equitable considerations may inform the formulation of remedies when a new rule is announced." *Id.* at 2526 (opinion concurring in the judgment).

It is perfectly clear that *Harper*, which held only that *Chevron Oil* "'cannot determine the choice of law'" (113 S. Ct. at 2516 n.9 (quoting *Beam*, 501 U.S. at 543 (opinion of Souter, J.))), leaves undisturbed *Chevron Oil*'s more limited remedial holding.[9]

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE STATE COURTS TO DISMISS COMPLAINTS MADE UNTIMELY THROUGH THE RETROACTIVE APPLICATION OF NEW CONSTITUTIONAL RULES

The Ohio Supreme Court has determined that extending the Ohio statute of limitations is appropriate for those who, like respondent, relied on the Ohio tolling statute. The sole question presented here is whether the Due Process Clause or some other provision of the federal constitution obligated Ohio to provide a dismissal remedy. Petitioners argue that the Due Process Clause itself requires the Ohio state courts to dismiss respondent's

---

[9] Petitioners are also wrong to suggest (Pet. Br. 43-44) that this Court silently overruled *Chevron Oil*'s remedial holding in *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. 350 (1991), another case involving the retroactive application of a decision shortening an applicable limitations period. The Court's silence about retroactivity issues in *Lampf* clearly does *not* constitute an implicit determination to foreclose remedial limitations, as *Beam* itself made clear. *Compare* 501 U.S. at 538 (opinion of Souter, J.) (choice-of-law retroactivity presumed because the Court "did not reserve" the issue) *with id.* at 543-44 (retroactivity determination does not "preclud[e] consideration of individual equities when deciding remedial issues in particular cases").

complaint, even though its untimeliness was established only through the retroactive application of *Bendix* and even though respondent plainly was relying on the presumptively valid Ohio tolling statute. Pet. Br. 41-43.

Like the dissenting judges below, petitioners appear to rest on the premise that the Due Process Clause requires a judicial remedy for every constitutional violation. Pet. Br. 42. But the Constitution itself "is singularly bare of remedial specification: it lays down a multitude of substantive rules but says virtually nothing about what is to happen if these are violated (or about who is to decide what is to happen if they are)." P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 926 (3d ed. 1988). And, while this Court has imposed limits on the power of the states to deny remedies for constitutional violations (*see, e.g., McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 n.9 (1987)), it has never embraced the categorical position urged here by petitioners.

As a general matter, as Justice Scalia has explained, "it is simply untenable that there must be a judicial remedy for every constitutional violation." *Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (dissenting opinion). The Constitution itself creates rights that are nonjusticiable (*see, e.g., Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1930) (Guaranty Clause)) and defines circumstances where judicial remedies are explicitly prohibited (*see, e.g., Nixon v. United States*, 113 S. Ct. 732 (1993) (judicial review of impeachment trials)). Limitations on the damages remedy available under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), ensure that some constitutional violations will go unremedied. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987). Absolute immunity doctrines ensure that, even if a *Bivens* or 42 U.S.C. § 1983 remedy were otherwise available, other constitutional violations will go unremedied. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976); *Butz v. Economou*, 438 U.S. 478 (1978). Sovereign immunity doctrines stand as a

"monument to the principle that some constitutional claims can go unheard." *Webster v. Doe*, 486 U.S. at 613 (Scalia, J., dissenting). The requirement of "individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command." Fallon & Meltzer, *supra*, at 1789. In constitutional law as elsewhere, "[r]emedies may be limited by practical considerations." I D. Dobbs, *Law of Remedies* 30 (2d ed. 1993).

This case presents the specific question whether state courts may constitutionally deny the harsh remedy of dismissing complaints rendered untimely through the retroactive application of *Bendix*. For several reasons, they clearly may. To begin with, it is undisputed that states may invoke their own statutes of limitation (*see, e.g., McKesson*, 496 U.S. at 45) or claim preclusion doctrines (*see Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); 28 U.S.C. § 1738) to deny remedies for constitutional violations. *See, e.g., Harper*, 113 S. Ct. at 2517 (state courts must apply new rules "in all cases still open on direct review"); *Estate of Donnelly*, 397 U.S. at 296-97 (Harlan, J., concurring) (courts must apply new rules "short of a bar of *res judicata* or statute of limitations"). There are, in other words, clear limits on a state's obligation to provide remedies for retroactively established constitutional violations. While the remedial limitation at issue here does not involve the application of a limitations period as such, it does involve a defendant's rights under a statute of limitations. Limitations periods are generally subject to retroactive revision (*see Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311-14 (1945)) and to the courts' equitable power "to craft rules of tolling, laches, and waiver" (*American Trucking*, 496 U.S. at 221 (Stevens, J., dissenting)). Consistent with these principles, *Chevron Oil* and its progeny confirm the permissibility of a tolling principle that bars dismissal of complaints that appear timely when filed, but are rendered untimely through the retroactive application of a decision of this Court. Moreover, even outside the statute of limitations context, this Court repeatedly has approved remedial limitations designed

to protect the interests of those who, like respondent, reasonably rely on existing law.

The principle we urge is limited in two important respects. First, we contend only that the state courts are constitutionally permitted, but not constitutionally compelled, to deny retroactive remedies under these circumstances. Although some states might afford retroactive remedies against pre-*Bendix* complaints, even though Ohio would not, it is well settled that states "may" — but need not — "provide relief beyond the demands of federal due process." *Harper*, 113 S. Ct. at 2520. Second, since the Ohio Supreme Court correctly held that *Bendix* satisfies the remedial criteria set forth in *Chevron Oil*, which address the specific problem of reasonable reliance on existing law, this Court need not speculate as to whether the *Chevron Oil* criteria define the outer boundaries of state power in this area.

A. Consistent with the Due Process Clause, State Courts Retain Broad Equitable Discretion To Grant or Deny Remedies Under Statutes of Limitations

This Court has long recognized that statutes of limitations "represent expedients," and "[t]heir shelter has never been regarded as what is now called a 'fundamental right.'" *Chase*, 325 U.S. at 314. Thus, the Due Process Clause permits legislatures to retroactively revive expired limitations periods and thereby "divest the defendant of the statutory bar." *See id.* at 311-12. And, as Justice Stevens has explained, statutes of limitations constitute an area over which "courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver" (*American Trucking*, 110 S. Ct. at 2354 (dissenting opinion)), which likewise extend limitation periods that by their terms have expired. *See also* I C. Corman, *Limitation of Actions* § 1.1, at 4 (1991) ("Considered in terms of the earlier right-remedy categorization, statutes of limitations bear on the availability of remedies and, as such, are subject to equitable defenses including estoppel, laches, the various forms of tolling, and potential application of the discovery rule.").

Most relevant here is the courts' well-settled equitable power to toll statutes of limitations and thereby preserve otherwise untimely claims. Under the tolling doctrine, "the strict command of the limitation period" may be "suspended" in the interests of fairness. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974). "Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232-33 (1959) (footnote omitted).[10]

A wide variety of considerations support equitable tolling, ranging from a defendant's own wrongful conduct (*see, e.g., id.* (defendant misled plaintiff about limitations period)), to procedural irregularities (*see, e.g., Burnett v. New York Central R.R.*, 380 U.S. 424, 431-32 (1965) (plaintiff filed complaint in wrong court)), to exigent circumstances beyond the control of either party (*see, e.g., id.* at 429 (approving tolling "when war has prevented a plaintiff from bringing his suit, even though a defendant in such a case might not know of the plaintiff's disability and might believe that the statute of limitations renders him immune from suit")). Because "[t]his equitable doctrine is read into every federal statute of limitation" (*Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)), it routinely applies where,

[10] Conversely, courts retain a traditional equitable power to impose timeliness requirements where the legislature has not done so. This Court has used at least three different methods to impose such requirements on federal claims: by applying traditional equitable principles of laches (*see, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946)), by "borrowing" analogous state statutes of limitations (*see, e.g., Reed v. United Transportation Union*, 488 U.S. 319 (1989)), or by "borrowing" analogous federal statutes of limitations (*see, e.g., Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987)).

as here, the underlying claim is for money damages. *See, e.g., American Pipe*, 414 U.S. 538; *Burnett*, 380 U.S. 424.[11]

The equitable tolling doctrine is but one application of centuries-old principles of equitable discretion. Under those principles, remedies need not issue "mechanically" for "every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Thus, an injunction "does not issue as a matter of course" (*Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 541, 542 (1987)), and a declaratory judgment "should be granted only as a matter of judicial discretion" (*Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426, 431 (1948)). "The equity system treats access to its remedies as at least in part a privilege." I D. Dobbs, *supra*, at 57.

In *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944), this Court summarized the flexibility of equitable discretion: "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Under this principle, courts retain discretion to deny remedies — even for violations that produce irreparable injuries — based on their assessment of the parties' "competing claims of injury" in each particular case. *Amoco Production Co.*, 480 U.S. at 542; *Romero-Barcelo*, 456 U.S. at 312. *See also Eccles*, 333 U.S. at 431 ("It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief.").

Like this case, *Chevron Oil* presented the "competing claims" of a plaintiff who had relied on existing law and a defendant who

[11] Even outside the limitations context, courts often invoke equitable principles to deny remedies for claims at law. For example, courts routinely apply equitable doctrines of waiver and estoppel (*see, e.g.*, D. Laycock, *Modern American Remedies* 907-08 (1985)), and this Court has extended equitable principles of *in pari delicto* to many claims at law, including damages actions for securities fraud and antitrust violations (*see, e.g., Pinter v. Dahl*, 486 U.S. 622, 633-34 (1988)).

had acquired a valid limitations defense under the retroactive application of a subsequent decision of this Court. In evaluating those claims, the Court stressed the importance of the plaintiff's reliance interests (404 U.S. at 107 ("The most he could do was to rely on the law as it then was")), the unfairness to the plaintiff of a dismissal remedy (*id.* at 108 ("It would . . . produce the most 'substantial inequitable results'") (citation omitted)), and the relatively limited imposition of simply making the defendant litigate on the merits (*id.* (refusal to dismiss "simply preserves [plaintiff's] right to a day in court")). Applying traditional equitable principles, the Court held that dismissal of the complaint was an inappropriate remedy under these circumstances. *See id.* at 108-09. Since *Chevron Oil*, the Court repeatedly has applied these principles in the statute of limitations context. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-09 (1987). The application of these equitable doctrines to toll a statute of limitations cannot possibly violate the Due Process Clause.

B. Even Outside the Statute of Limitations Context, This Court Frequently Has Recognized That Changes in Decisional Law Justify Denying Remedies For Constitutional Violations

"[I]t is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Nixon v. Fitzgerald*, 457 U.S. 731, 754-55 n.37 (1982). On the contrary, remedies are often denied against those who, like respondent here, reasonably rely on law that is subsequently — and retroactively — changed by decisions of this Court. "The novelty of a judicial ruling may be an important influence in a remedial calculus. For it may be unfair, or at least highly disruptive, to insist upon standard remedies for all past conduct condemned by an unpredictable ruling." Fallon & Meltzer, *supra*, at 1765.

This Court's decisions reflect acute concern for the potential unfairness associated with the retroactive application of new rules. Just last Term, the Court stressed the fundamentality of that

concern: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994). *Landgraf*, of course, confirmed the longstanding presumption that statutes (including those that shorten limitations periods) do not apply retroactively. *See id.* at 1497-1505; *United States v. St. Louis S.F. & T. Rwy.*, 270 U.S. 1 (1926).

This Court has fashioned numerous other doctrines to protect reliance interests from being upset by the decisional law of the Court. Some find expression in general rules that prohibit awarding retroactive remedies when the conduct at issue was not clearly unlawful under existing law. Others involve case-by-case determinations to delay the prospective implementation of federal decrees. Finally, yet others involve application, outside the statute of limitations context, of exactly the kind of remedial considerations recognized in *Chevron Oil*. While none of these areas involves issues identical to those presented here, together they fatally undercut petitioners' contention that even where reliance interests are at stake, the Due Process Clause requires full remediation of every constitutional violation.

1. Qualified Immunity and Habeas Corpus Doctrines Categorically Prohibit Remedies For Newly Established Constitutional Violations

The doctrine of qualified immunity establishes a categorical rule that government officials cannot be liable in damages for constitutional violations established by the retroactive application of new rules. Under that doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). Since federal law does not generally permit victims to seek damages from either state agencies (*Will v.*

Michigan Department of State Police, 491 U.S. 58 (1989)), or federal agencies (*FDIC v. Meyer*, 114 S. Ct. 996 (1994)), the effect of the immunity is often to leave them without remedy. *See Wyatt v. Cole*, 112 S. Ct. 1827, 1836 (1992) (Kennedy, J., concurring) ("To cast the issue in terms of immunity . . . is to imply that a wrong was committed but that it cannot be redressed.").[12]

The qualified immunity doctrine rests on the premise that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Thus, the determination of whether a right is "clearly established" for qualified immunity purposes must be based on existing law at the time of the relevant conduct. *See Creighton*, 483 U.S. at 639; *Harlow*, 457 U.S. at 818. The doctrine thus bars damages remedies for constitutional violations established by the retroactive application of subsequent decisions announcing new rules of constitutional law. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 532-36 (1985). And far from being inconsistent with the retroactive application of such decisions, the doctrine is necessary as a remedial limitation precisely because of it. *See American Trucking*, 496 U.S. at 216 n.5 (Stevens, J., dissenting) ("[O]ur whole law of qualified immunity is predicated on the assumption that even 'new' law decisions apply retroactively.").[13]

---

[12] Victims may recover damages from responsible municipal agencies, but only where the constitutional violation was caused by an established municipal policy or custom. *See Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

[13] In *Wyatt v. Cole*, this Court held that private parties sued under 42 U.S.C. § 1983 are not entitled to raise a qualified immunity defense that includes a right of interlocutory appeal. At the same time, however, five Justices acknowledged that private parties would be entitled to raise a substantively similar good-faith defense (but without a right of interlocutory appeal). *See* 112 S. Ct. at 1836 (Kennedy, J., concurring); *id.* at 1837-39 (Rehnquist, C.J., dissenting).

Similarly, under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, this Court has established a general rule that state prisoners cannot obtain federal habeas corpus relief under a new rule of criminal procedure established after a conviction has become final on direct review. For purposes of *Teague*, a "new rule" is one that was not "dictated" by existing precedent (*id.* at 301) (plurality opinion)) or one that, prior to the decision at issue, would have been "susceptible to debate among reasonable minds." *Butler v. McKellar*, 494 U.S. 407, 415 (1990). *Teague* thus validates "reasonable, good-faith interpretations of existing precedents . . . even though they are shown to be contrary to later decisions." *Id.* at 414.[14]

Justified by the limited remedial nature of federal habeas corpus,[15] *Teague* protects reliance interests similar to those present here. Like private parties, state judges must rely on existing precedent and cannot always predict the future. And, as this Court has explained, "'"[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [subsequent habeas] proceeding, new constitutional commands."'" *Butler*, 494 U.S. at 413-14 (quoting *Teague*, 489 U.S. at 310 (plurality opinion) (in turn quoting *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982))).

2. This Court Has Permitted Delay in the Remedial Implementation of its Own Decrees

Even where prospective remedies are at issue, this Court has permitted delay in the implementation of its own decrees, guided

---

[14] The *Teague* doctrine admits only two narrow exceptions: a state prisoner may obtain federal habeas relief if the new rule places his primary conduct beyond the power of the criminal lawmaking authority or if it creates an "absolute prerequisite" of adjudicatory fairness. *See, e.g., Teague*, 489 U.S. at 311-15 (plurality opinion).

[15] *See, e.g., Teague*, 489 U.S. at 305-10 (plurality opinion); *Mackey*, 401 U.S. at 682-95 (Harlan, J., concurring in the judgment); *Desist*, 394 U.S. at 260-65 (Harlan, J., dissenting).

by traditional equitable principles, in order to minimize the disruptive effect of decisions announcing significant new rules of constitutional law.

In *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), the Court held that the use of desegregation remedies to implement its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), would be governed by traditional equitable principles. Citing *Hecht v. Bowles*, the Court explained that equity traditionally "has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." 349 U.S. at 300 (footnotes omitted). Thus, recognizing that "additional time" might be "necessary in the public interest," the Court in *Brown II* declined to order immediate compliance with *Brown I*, but only a "prompt and reasonable start toward full compliance" (*id.*), compliance "at the earliest practicable date" (*id.*), and a transition to nondiscriminatory policies "with all deliberate speed" (*id.* at 301). The Court's subsequent decisions, while emphasizing the importance of remediation, likewise recognized possible limitations if the remedies threatened "important and legitimate ends" (*Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979)) or were simply not "practicable" (*Board of Educ. of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 630, 638 (1991)).

This Court has permitted delay in remedial implementation in other constitutional contexts as well. For example, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that the broad conferral of adjudicatory power to the bankruptcy courts under the Bankruptcy Act of 1978 violated Article III. The Court declined to disturb past adjudications, however, and it stayed its judgment for over three months in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Id.* at 88. Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that the Federal Election Commission had been constituted in violation of the Appointments

Clause. However, the Court declined to disturb the Commission's prior acts, and it imposed a "limited stay" of its judgment in order to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement." *Id.* at 143.

3. Applying the *Chevron Oil* Standards, This Court Has Limited the Retrospective Remedies Available in Federal Court For Violations Established by the Retroactive Application of Precedent

Over a wide variety of cases, even outside the statute of limitations context, this Court has applied the principles of *Chevron Oil*, or analogous principles, to limit retrospective relief for violations established by the retroactive application of new decisional law.

In *Lemon II*, for example, the Court invoked traditional equitable principles in holding that states may reimburse sectarian schools for services rendered in violation of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), but provided before *Lemon I* was announced. The Court explained that equity permits consideration of the "practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." 411 U.S. at 201. In applying those principles, the Court stressed both the necessity of reliance on existing law and the fact that a state statute had explicitly authorized the reimbursements at issue. *See id.* at 199 ("[S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct"); *id.* at 209 ("[S]tate officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful"). *See also Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (per curiam) (denying retroactive remedies for pre-decision violations of new rule of Equal Protection); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 214-15 (1970) (same).

This Court has adopted a similar remedial approach where important federal statutory rights are at issue. For example, in

Manhart, this Court held for the first time that even though women on average live longer than men, requiring female employees to make larger annual contributions to a pension fund constituted a violation of Title VII. Nonetheless, the Court declined to award "retroactive relief" for pre-*Manhart* violations. 435 U.S. at 718. Noting that courts "had been silent on the question" prior to *Manhart*, and that "the administrative agencies had conflicting views," the Court reasoned that "conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful." *Id.* at 720. The Court found "no reason to believe" that retroactive remedies for pre-*Manhart* violations were necessary to ensure future compliance with Title VII (*id.* at 721), and it recognized the substantial unfairness that such remedies would impose (*id.* at 721-22).

Later, when the Court extended *Manhart* from contribution requirements to benefit levels in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), five Justices employed a similar analysis to support the denial of retroactive remedies for pre-*Norris* violations. *See id.* at 1105-07 (Powell, J., concurring in part and dissenting in part); *id.* at 1109-11 (O'Connor, J., concurring). *See also Allen v. State Board of Elections*, 393 U.S. 544, 571-72 (1969) (denying retroactive remedies for newly established Voting Rights Act violation); *Simpson v. Union Oil Co.*, 377 U.S. 13, 25 (1964) (reserving retroactive remedies question for newly established antitrust violation).

Finally, this Court has declined to afford retroactive remedies for pre-decision violations of new procedural rules. For example, in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Court held that a litigant forced to proceed in state court under federal abstention must explicitly reserve the right to return to federal court once the state proceedings are completed. However, stressing that the appellants before it had relied on a "mistaken" but not "unreasonable" view of the law as it previously had appeared, the Court held that the dismissal of

their federal action, for failure to make the necessary reservation, was improper. *See id.* at 422-23.

* * * *

In sum, this Court's decisions reveal the widespread permissibility of remedial limitations designed to account for reliance on existing law. Such limitations are universal as a solution to the new law problem in the contexts of qualified immunity and federal habeas corpus. Even where prospective remedies are at issue, remedial limitations are permissible depending on the circumstances of each case. And in the civil retroactivity context specifically, they are permissible with respect to a wide range of constitutional, statutory and procedural violations established through the retroactive application of new law.

In the final analysis, however, this Court need look no further than the remedial holdings of *Chevron Oil* and its progeny. There are only two conceivable distinctions between this case and the *Chevron Oil* line of cases. First, this case involves remedies made available by a constitutional decision of this Court, while the *Chevron Oil* cases involved remedies under decisions construing federal statutes. It is well settled, however, that the remedial and equitable principles on which *Chevron Oil* rests apply with undiminished force in the constitutional context. *See, e.g., Lemon II*, 411 U.S. at 199-206; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *Brown II*, 349 U.S. at 300-01.

Second, this case began in state court, while the *Chevron Oil* cases began in federal court. But principles of Due Process restrict both the state and federal courts alike (U.S. Const. Amends. V, XIV), and the state courts generally may afford even greater remedies than those required as a matter of federal law (*see, e.g., Harper*, 113 S. Ct. at 2520). Thus, "it would be wholly anomalous to suggest that federal courts are permitted to determine the scope of the remedy by reference to *Chevron Oil*, but that state courts are barred from considering the equities altogether." *Id.* at 2537 (O'Connor, J., dissenting).

D. *McKesson* and *Reich* Do Not Address the Remedial Issues Present Here

Petitioners bear an extraordinarily high burden to establish that the Due Process Clause requires remedies for constitutional violations established through the retroactive application of new law. As we have demonstrated, the denial of remedies for such violations is widespread and longstanding. And, as this Court has repeatedly recognized, widespread and longstanding practices are not likely to violate the Due Process Clause. *See, e.g., Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2339 (1994); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991). That principle has even greater force where, as here, the practice at issue has been embraced not only by the political branches, and not only by the common law courts, but by this Court itself.

Petitioners cite only one case, *McKesson*, that discusses the scope of the states' obligation to remedy constitutional violations and, conversely, the permissibility of state-imposed remedial limitations. Pet. Br. 42. That case, however, addressed remedial considerations substantially different from those present here.

In *McKesson*, this Court held that taxpayers compelled to pay an unconstitutionally discriminatory tax, without being afforded a meaningful pre-deprivation opportunity to challenge the tax, must receive a retroactive remedy. *See* 496 U.S. at 36-41. *McKesson*, however, did not address the question of retroactive remedies where new law is at issue. On the contrary, the Court carefully explained that the tax at issue reflected only "cosmetic changes" from, and was "virtually identical" to, a tax that this Court had previously invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *See* 496 U.S. at 46. The Court noted further that the state had not claimed, and could not claim, "surprise" from its ruling. *Id.* at 50. And, in responding to an argument that "equitable considerations" would justify the denial of a retroactive remedy (*id.* at 44), the Court expressly acknowledged that "state interests traditionally have played, and may play, some role in shaping the contours of the relief that the

State must provide to illegally or erroneously deprived taxpayers" (*id.* at 50).

On the date *McKesson* was announced, four Justices confirmed that the Court there "had no occasion to consider the equities of *retroactive* application of new law" — either in a choice-of-law or a remedial sense — "because that case involved only the application of settled Commerce Clause precedent." *American Trucking*, 496 U.S. at 181 (plurality opinion) (emphasis in original). One Term later, Justice Stevens, a fifth member of the *McKesson* Court, joined a sixth Justice who repeated yet again that *McKesson* "did not deal" with the question of "reliance interests entitled to consideration in determining the nature of the remedy that must be provided." *Beam*, 501 U.S. at 544 (opinion of Souter, J.). *See also Harper*, 113 S. Ct. at 2537-38 (O'Connor, J., dissenting) (discussing *McKesson*).

Moreover, *McKesson* addressed the circumstances under which the states must provide retroactive remedies for unconstitutional taxes. The remedial considerations in that context are substantially different from those present here, because the states themselves may impose a wide variety of permissible remedial limitations, to protect themselves against retroactive application of new law, that simply are not available to an individual litigant. To begin with, states may eliminate any possibility of a retroactive liability if they permit taxpayers to challenge the disputed taxes before they are paid. *See McKesson*, 496 U.S. at 38 n.21 ("The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure."). Even if they choose to afford no predeprivation remedy, states may retroactively eliminate unconstitutional discrimination not by refunding the taxes extracted from the disfavored group, but by retroactively increasing the taxes imposed on the favored group, subject only to very modest constitutional limitations. *See, e.g., United States v. Carlton*, 114 S. Ct. 2018 (1994); *McKesson*, 496 U.S. at 40 n.23. Finally, states may erect a wide range of procedural barriers, including prompt notice requirements and

short statutes of limitations, that are specifically targeted to taxpayer refund actions. *See id.* at 44-46. None of these options exists for an individual litigant outside the tax refund context, and the need for a *Chevron Oil* limitation is therefore much greater.

For similar reasons, this Court's recent decision in *Reich v. Collins*, No. 93-908 (Dec. 6, 1994), also is not relevant. *Reich* involved claims for tax refunds to remedy constitutional violations established by the retroactive application of *Davis*. This Court addressed only the question whether the Georgia Supreme Court had properly denied retroactive (i.e., post-deprivation) remedies "on the basis of Georgia's predeprivation remedies." Slip Op. at 4. The Court did not address whether remedies could be denied on the alternative ground that *Davis* had established a new rule, a question that evenly divided the four Justices to address it in *Harper*. *Compare* 113 S. Ct. at 2526 (Kennedy, J., concurring in the judgment) *with id.* at 2531-34 (O'Connor, J., dissenting). Nonetheless, the Court's analysis in *Reich* once again confirmed the importance of the kind of reliance interests at stake in this case: "'Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.'" Slip Op. 6 (quoting *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958)).

Given this Court's longstanding and repeated practice of limiting the remedies available for violations of law (constitutional and otherwise) established by the retroactive application of new precedents, and given the lack of any authority suggesting that this practice is impermissible, its application by the Ohio Supreme Court in this case cannot possibly violate the Due Process Clause.

III. *BENDIX* ESTABLISHED A NEW CONSTITUTIONAL RULE FOR REMEDIAL LIMITATIONS PURPOSES

In *Chevron Oil*, this Court set forth three considerations for determining whether to limit the remedies available for violations established through the retroactive application of a judicial precedent:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. *First*, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Second*, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Finally*, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted and emphases added). The Ohio Supreme Court correctly concluded that each of these considerations supported its decision not to dismiss pre-*Bendix* complaints.

A. *Bendix* Decided an Issue of First Impression Whose Resolution Was Not Clearly Foreshadowed

Petitioners ignore many significant factors that clearly demonstrate the novelty of *Bendix*. First, American law creates a "presumption of constitutionality to which every duly enacted state and federal law is entitled" (*Lockport v. Citizens For Community Action*, 430 U.S. 259, 272 (1977)), which Justice Stewart has characterized as "one of the first principles of constitutional adjudication" (*San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (concurring opinion)). Citizens "are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon II*, 411 U.S. at 208-09. Indeed, at common law, "a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." *Wyatt*, 112 S. Ct. at 1837 (Kennedy, J. concurring).

Second, in *Bendix* itself, this Court evaluated Section 2305.15 under the balancing test established in *Pike* and restated in *Brown-Forman*. *See* 486 U.S. at 891-95. This balancing process is inherently subjective and unpredictable; it often produces "something of a 'quagmire,'" as this Court candidly has acknowledged. *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1914-15 (1992) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959)). *See also American Trucking*, 496 U.S. at 201 (Scalia, J., concurring in the judgment). Thus, although *Bendix* ultimately concluded that the "significant" interstate burdens of Section 2305.15 outweighed its "important" local benefits, the only Justice to address a comparable question prior to *Bendix* had concluded that the interstate burdens imposed by New Jersey's substantially more onerous tolling statute were "fairly negligible." *Honda Motor Co. v. Coons*, 469 U.S. 1123, 1126 (1985) (Rehnquist, J., dissenting from denial of certiorari).

Third, *Bendix* followed *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), in which this Court had rejected an Equal Protection challenge to the New Jersey tolling statute. Petitioners trumpet the statement in *Cresco v. Stapf*, 608 A.2d 241, 251 (N.J. 1992), that *Searle* had "indicated that the [New Jersey] tolling statute might run afoul of the Commerce Clause." Pet. Br. 28. But the Commerce Clause question reserved in *Searle* — without comment about its likelihood of success — was substantially different from the one decided in *Bendix*.

The New Jersey tolling statute at issue in *Searle* required an out-of-state corporation not only to appoint an agent for service of process, but also to obtain a business license. *See Coons v. American Honda Motor Co.*, 463 A.2d 921, 923-24 (N.J. 1983), *cert. denied*, 469 U.S. 1123 (1985). The *Searle* petitioners sought invalidation of the New Jersey tolling statute under a line of cases culminating in *Allenberg Cotton Company, Inc. v. Pittman*, 419 U.S. 20 (1974), which established a *per se* rule that the states may not require corporations engaged solely in interstate commerce to obtain a business license in order to gain access to the courts. Thus, the question reserved in *Searle* was whether the

Allenberg rule should be extended to cover cases where corporations engaged solely in interstate commerce must obtain a business license in order to gain protection of the statutes of limitation. *See Searle*, 455 U.S. at 413; *Honda*, 469 U.S. at 1125 (Rehnquist, J., dissenting from denial of certiorari). That question has no conceivable relevance in states like Ohio, where the tolling statute merely requires out-of-state corporations to "appoint an agent for service of process" (*Bendix*, 486 U.S. at 889), and where another statute specifically exempts all *Allenburg*-protected corporations from all applicable licensing requirements (Ohio Rev. Code §§ 1703.02, 1703.03).

Fourth, the fact that *Searle* upheld the New Jersey statute under rational basis review would have further suggested the absence of significant Commerce Clause difficulties where the *Allenburg* line of cases did not apply. For example, in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973), this Court indicated that rational basis review was appropriate only if "no specific federal right, apart from equal protection, is imperiled." Among the "[c]lassic examples" of other such rights, the Court listed "required licenses to engage in interstate commerce" and "taxes that discriminated against . . . interstate commerce." *Id.* at 359 n.3.[16] Also, in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 876-77 n.6, 880-81 (1985), the Court suggested that Equal Protection restrictions against burdening out-of-state interests sweep at least as broadly as Commerce Clause restrictions. Thus, the validity of the New Jersey tolling statute against an Equal Protection challenge in *Searle* strongly suggested that, unless *Allenburg* applied, it would pass Commerce Clause muster as well.

---

[16] *Lehnhausen*, of course, was merely applying settled principles that "[w]hen a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny" (*Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986)) and that engaging in interstate commerce is a "righ[t] of constitutional stature" (*Garrity v. New Jersey*, 385 U.S. 493, 500 (1967)).

Finally, the Ohio tolling statute on which respondent relied was enacted in its original form in 1810.[17] Before *Bendix* declared it unconstitutional, the Ohio Supreme Court had routinely applied the provision — without hint of constitutional difficulty — for over 175 years.[18] Two judges in the United States District Court for the Southern District of Ohio had published opinions rejecting Equal Protection challenges to the provision — without hint of Commerce Clause difficulty.[19] Nor was the Ohio tolling provision unusual: as of 1974, at least 30 different states had adopted similar provisions.[20]

To overcome the presumption of constitutionality, the absence of any helpful authority from this Court, and the weight of almost

---

[17] As originally enacted, the tolling statute provided:

> [W]hen any person or persons against whom there is a cause of action, shall have left the state, and remain out of the state at the same time that such cause of action shall have accrued, or shall have left the state or country, and remain out of the same in a place or places unknown to the person or persons, in whose name such cause of action may exist, at any time during such time as is limited in the foregoing section of this act, the person or persons who shall or may have such a cause of action, shall have liberty to bring his, her or their action or actions against such person or persons, within such time as is limited as aforesaid, after his, her or their return to the state or country.

VIII Acts Passed by the First Session of the Eighth General Assembly of the State of Ohio ch. XVIII, § 2 (1810).

[18] *See, e.g., Seeley v. Expert, Inc.*, 269 N.E.2d 121 (Ohio 1971); *Moss v. Standard Drug Co.*, 112 N.E.2d 542 (Ohio 1953); *Couts v. Rose*, 90 N.E.2d 139 (Ohio 1950); *Commonwealth Loan Co. v. Firestine*, 73 N.E.2d 501 (Ohio 1947); *Title Guaranty & Surety Co. v. McAllister*, 200 N.E. 831 (Ohio 1936).

[19] *Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981); *Jatco, Inc. v. Charter Air Center*, 527 F. Supp. 314 (S.D. Ohio 1981).

[20] *See generally* Annotation, 55 A.L.R.3d 1158, 1160-61 (1974) (listing jurisdictions).

two centuries of history, petitioners cite exactly two published decisions — neither of which was ever controlling in Ohio — that invalidated tolling statutes prior to the *Bendix* litigation. Pet. Br. 31. The first case, *Coons v. American Honda Motor Co.*, did nothing more than decide the *Allenberg* question left open in *Searle*. *See* 463 A.2d at 926.[21] Since *Coons* had no occasion to balance under *Pike* the benefits and burdens of a tolling statute that did not require licensing (and thus could survive per-se scrutiny under *Allenberg*), the courts quickly recognized that whether *Coons* could extend to "less burdensome process[es]" remained "an open question." *Turner v. Smalis*, 622 F. Supp. 248, 254 (D. Md. 1985).

That question was addressed, however, in the second case mentioned by petitioners. Although they cite the district court decision in *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Idaho 1983), petitioners fail to note that *McKinley* was reversed on appeal. In holding that the former Idaho tolling statute did *not* violate the Commerce Clause, the Ninth Circuit, citing *Allenburg*, specifically limited *Coons* to tolling statutes that impose licensing requirements on foreign corporations engaged exclusively in interstate commerce. *See McKinley v. Combustion Engineering, Inc.*, No. 84-3505 (9th Cir. Oct. 1, 1984), Slip Op. at 5.

With respect to Ohio precedent, petitioners cite only a single pre-*Bendix* opinion — the *unpublished* district court decision in *Copley v. Heil-Quaker*, No. C-82-512 (N.D. Ohio March 8, 1984). Pet. Br. 29-31. A single unpublished opinion, however, could hardly foreshadow a decision of this Court or establish the unreasonableness of relying on a centuries-old, routinely applied Ohio statute. Moreover, two Ohio unpublished opinions had

---

[21] Even the limited Commerce Clause holding of *Coons* was novel enough, in New Jersey, to justify the denial of retroactive dismissals of pre-*Coons* complaints. *See Coons v. American Honda Motor Co.*, 476 A.2d 763 (N.J. 1984); *Cohn v. G.D. Searle & Co.*, 784 F.2d 460 (3d Cir. 1986).

upheld Section 2305.15 against Commerce Clause challenge. *See Froug v. A.H. Robins Co.*, No. C-3-80-527 (S.D. Ohio Aug. 4, 1982); *In re Shary Nunley*, No. C-2-80-458 (S.D. Ohio Dec. 1, 1983).[22]

Finally, petitioners argue that the unconstitutionality of Section 2305.15 became clearly foreshadowed in the *Bendix* litigation even before this Court's decision. Thus, petitioners urge that respondent could no longer rely on that provision after June 3, 1987, when the United States Court of Appeals for the Sixth Circuit handed down its *Bendix* opinion invalidating the tolling statute. Pet. Br. 31-32. But this Court did not regard the Commerce Clause issue as settled: it did not summarily affirm the Sixth Circuit's decision, but instead ordered full briefing and argument. Moreover, the Sixth Circuit decision would not govern the Ohio state courts. *See, e.g., Lockhart v. Fretwell*, 113 S.Ct. 838, 846 (1993) (Thomas, J., concurring). Finally, even if the Sixth Circuit decision had resolved the issue, equity still would permit affording respondent a reasonable amount of time *after* the Sixth Circuit decision to learn about the new rule and prepare her lawsuit accordingly. *Cf. Wilson v. Iseminger*, 185 U.S. 55, 62 (1902) (statutes imposing shortened limitations periods must "allow a reasonable time after they take effect for the commencement of suits upon existing causes of action"). Respondent filed her lawsuit on August 11, 1987, barely two months after the Sixth Circuit decision was announced, and exactly three weeks after the decision appeared in the advance sheets of the federal reporter. 820 F.2d 186 (paper ed. July 20,

---

[22] Petitioners make no attempt to defend the proposition, asserted by the intermediate appellate court below (Pet. App. A25), that *Title Guaranty & Surety Co. v. McAllister*, 200 N.E. 831 (Ohio 1936), and *Thompson v. Horvath*, 227 N.E.2d 225 (Ohio 1967), "questioned" the constitutionality of the Ohio tolling statute. Those cases neither decided nor addressed any constitutional question.

1987). Respondent's complaint surely was filed within a "reasonable time" under the circumstances.[23]

B. Denial of Retroactive Remedies Will Not Retard the Operation of *Bendix*

The purpose of the *Bendix* rule, like that of dormant commerce clause jurisprudence generally, is to prevent the states from discriminating against or unreasonably burdening interstate commerce. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1349-50 (1994). The Ohio Supreme Court decision, which affects only a closed class of cases involving past transactions, threatens neither of these objectives.

To begin with, denying retroactive remedies for pre-*Bendix* complaints plainly would not even affect, much less burden unreasonably, the present or future conduct of interstate commerce. Prospective defendants remain secure in the knowledge that they may leave Ohio without forfeiting a statute of limitations defense, and prospective plaintiffs now know that

---

[23] The cases finding a "reasonable time" under Federal Rule of Civil Procedure 60(b), which permits parties to move for relief from judgments "within a reasonable time," confirm that respondent's complaint readily satisfies any reasonableness standard that might apply. *See, e.g., Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868-69 (1988) (10 months after judgment entered); *In re Emergency of Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981) (26 months after judgment entered); *Williams v. Capital Transit Co.*, 215 F.2d 487, 489 & 490 n.1 (D.C. Cir. 1954) (three months after judgment entered and three weeks after moving party learned of it); *P.T. Busana Idaman Nurani v. Marissa by GHR Indus. Trading Corp.*, 151 F.R.D. 32, 35-36 (S.D.N.Y. 1993) (two years after judgment entered and two months after moving party learned of it). Moreover, the reasonableness is even more clear in this case because petitioners have claimed no prejudice from any delay, an important consideration in the reasonableness determination. *See Liljeberg*, 486 U.S. at 868-69.

complaints not filed within the applicable limitations period will be dismissed. *Cf. Manhart*, 435 U.S. at 720-21 ("There is no reason to believe that the threat of a [retroactive remedy] is needed to cause other administrators to amend their practices to conform to this decision.").

Moreover, as discussed below, the evenhanded application of *Chevron Oil* inflicts no discrimination that is inimical to Commerce Clause values. Petitioners were denied a dismissal remedy not because of their statuts as out-of-state defendants, but because of the novelty of *Bendix*. Petitioners do not contend that the Ohio courts have invoked *Chevron Oil* selectively in this case, as a pretext for discrimination. Nor could they, since the Ohio appellate courts routinely have applied *Chevron Oil* principles on a neutral basis, regardless of the identitiy of the parties seeking and opposing the remedial limitation.[24]

C. Dismissing Pre-*Bendix* Complaints Would Produce Inequitable Results

Retroactive dismissal under a decision shortening the applicable limitations period is the paradigmatic example of an "inequitable result." *See, e.g., Saint Francis College*, 481 U.S. at 606-07; *Chevron Oil*, 404 U.S. at 105-09. If her complaint should be dismissed, respondent would lose any chance to prove her claim, despite the novelty of *Bendix* and despite her reliance on a tolling statute presumed at the time, as a matter of law, to be constitutional.

Apart from *Chevron Oil* itself, numerous lines of authority confirm the unfairness of retroactively dismissing as untimely a

---

[24] *See, e.g., Day v. Hissa*, 1994 Ohio App. LEXIS 4950 (Ct. App. Nov. 3, 1994); *McGowan v. State Auto. Mut. Ins. Co.*, 1993 Ohio App. LEXIS 626 (Ct. App. Feb. 4, 1993); *Wendell v. Ameritrust Co.*, 1992 Ohio App. LEXIS 3834 (Ct. App. July 23, 1992), *aff'd in relevant part and rev'd in part*, 630 N.E.2d 368 (Ohio 1994); *Moore v. National Castings, Inc.*, 1990 Ohio App. LEXIS 5467 (Ct. App. Dec. 14, 1990); *Anello v. Hufziger*, 547 N.E.2d 1220 (Ohio Ct. App. 1988).

complaint that was or appeared to be timely when filed. In a series of older decisions, this Court even held that such dismissals would be unconstitutionally arbitrary. For example, in *Wilson*, 185 U.S. at 62, the Court stated that:

> A statute could not bar the existing rights of claimants without affording this opportunity [to file suit]; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.[25]

Although the modern Court arguably might tolerate such statutes as a constitutional matter, this longstanding concern about arbitrarily extinguishing rights continues to inform the *Chevron Oil* analysis. *See* 404 U.S. at 108 (denying dismissal remedy "simply preserves [plaintiff's] right to a day in court").

Apart from constitutional restrictions, this Court also has vigorously enforced the presumption that statutes do not apply retroactively, because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 114 S. Ct. at 1497. Although statutory retroactivity obviously presents concerns not at issue here, *Landgraf* nonetheless underscores the importance of protecting those who rely on existing law — an objective that the law of remedies is more than flexible enough to accommodate.

On the other hand, petitioners can claim no significant injustice from the denial of a dismissal remedy, notwithstanding their erroneous assertion (Pet. Br. 35) of a constitutional entitlement to

---

[25] *See also Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96, 102 (1906); *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873). One decision even invalidated a dismissal accomplished through the retroactive application of a judicial decision. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

repose. Although petitioners do have a legitimate interest in not being compelled to defend against stale claims, statutes of limitations still are not fundamental rights, but merely "expedients." *Chase*, 325 U.S. at 314. Respondent filed her complaint in this case less than four years after the accident. Petitioners contend neither that respondent delayed unreasonably nor that they have suffered any prejudice as a result. Thus, petitioners could not even begin to make out a claim under the equitable principles of laches. *See generally* D. Laycock, *Modern American Remedies* 964-68 (1985). Moreover, since *Bendix* established new law, the Ohio Supreme Court decision merely prevents petitioners from obtaining a windfall that they could not have expected when respondent began this lawsuit.

Finally, petitioners would have acquired only a limited expectation of repose even if they could have anticipated *Bendix* before respondent filed her complaint. A forum state typically applies its own statutes of limitations in its own courts. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). Thus, even after the Ohio limitations period had run, petitioners could have been sued in any other forum (subject to personal jurisdiction constraints) with a limitations period of four or more years, or a constitutional tolling provision.[26]

IV. PETITIONERS RAISE NO CONSTITUTIONAL CLAIM BASED ON AN ANTIDISCRIMINATION PRINCIPLE

Petitioners do not contend that the decision below to deny retroactive remedies was a pretext for discrimination on any constitutionally impermissible basis. If the Ohio Supreme Court had selectively invoked *Chevron Oil* in this case because petitioners are out-of-state defendants, or because petitioners are engaged in interstate commerce, then its denial of a remedy

---

[26] This Court's own cases confirm that this possibility is far from hypothetical. *See, e.g., Ferens v. John Deere Co.*, 494 U.S. 516, 519-21 (1990); *Sun Oil*, 486 U.S. 717; *Keeton v. Hustler Magazine*, 465 U.S. 770, 778-79 (1984).

presumably would constitute a violation of the Commerce Clause independent of the violation established by the retroactive application of *Bendix*, since the Commerce Clause prohibits such discrimination almost categorically. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 149 & n.19 (1986); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Similarly, if the Ohio Supreme Court had selectively invoked *Chevron Oil* in this case because petitioners were asserting federal rights as opposed to state rights, then its denial of a remedy arguably would violate the antidiscrimination principle established in *Howlett v. Rose*, 496 U.S. 356, 372-81 (1990), and *Testa v. Katt*, 330 U.S. 386, 389-94 (1947), which requires state courts to entertain (and perhaps remedy) federal claims if they would entertain analogous state claims.

A proper rejection of petitioners' Due Process argument would not foreclose challenges to the denial of a remedy, in future cases, based on such antidiscrimination principles. In this case, however, petitioners have not raised such arguments. And in any event, it is clear that they would be without merit. *See supra* note 24 and accompanying text.

CONCLUSION

The judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

DAVID J. EARDLEY
(Counsel of Record)
EARDLEY & ZULANDT
114 East Park Street
Chardon, Ohio 44024
(216) 286-6177

TIMOTHY B. DYK
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Respondent

December 13, 1994